UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL MARTINEZ,

Plaintiff,

v.

HELEN MARTINEZ and THE SUQUAMISH TRIBE,

Defendant.

Case No. C08-5503 FDB

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS AND GRANTING PLAINTIFF DECLARATORY AND INJUNCTIVE RELIEF

This matter comes before the Court on motions of Defendants Helen Martinez and the Suquamish Tribe to dismiss Plaintiff's complaint for declaratory and injunctive relief. The Defendants assert that because Plaintiff has failed to exhaust tribal court remedies this Court lacks jurisdiction to determine whether the Suquamish Tribe has jurisdiction to enter an order of protection against Plaintiff and to act upon a dissolution petition filed by Defendant Helen Martinez. For the reasons stated below, this Court denies the motion to dismiss and finds that the Suquamish Tribe lacks jurisdiction to enter protective orders and act upon the dissolution petition regarding these non-members of the Suquamish Tribe.

Introduction and Background

The undisputed material facts are as follows: Daniel and Helen Martinez are married and have two children. Plaintiff Daniel Martinez is a non-Indian and not a member of the Suquamish Tribe. Defendant Helen Martinez is an Alaska Native and she and her children are members of the Native Village of Savoonga. Ms. Martinez and her children are not members of the Suquamish Tribe. The family resides on fee land owned by a non-Indian located within the Suquamish Reservation.

The parties have appeared before the Suquamish Tribal Court in the past seeking domestic relations protection orders. In July of 2007, Daniel Martinez petitioned for and obtained a temporary protection order restraining Helen Martinez from her husband and children. By agreement of the parties this order was dismissed in August of 2007. Thereafter, Helen Martinez filed a petition for dissolution of marriage with the Tribal Court. This petition was also dismissed by stipulation of the parties.

On February 28, 2008, Helen Martinez initiated a new action in the Tribal Court seeking a domestic violence order of protection against her husband. A temporary order was issued on that date prohibiting Mr. Martinez from contacting his wife or children and from going to their home. Daniel Martinez was served with the temporary protection order and notice of a March 27, 2008 hearing on a permanent order of protection. Mr. Martinez appeared at the hearing. The Court entered a final order of protection which Mr. Martinez signed in court. This order of protection prohibits Mr. Martinez from contacting his wife or children and from going to their home until July 28, 2010.

On March 4, 2008, Ms. Martinez filed for dissolution of marriage and custody of their children in the Tribal Court and moved for temporary orders. Mr. Martinez responded by filing a proposed parenting plan and a financial declaration. The Tribal Court entered a temporary order on April 29, 2008. The Tribal Court set a trial date for dissolution of the marriage for February 27, 2009.

On May 14, 2008, counsel for Mr. Martinez filed a notice of appearance in both matters asserting lack of subject matter jurisdiction. The Tribal Court denied counsel's written request for a copy of the record of the domestic violence protective order case on the basis that the case was closed.

This complaint for declaratory and injunctive relief followed.

Subject Matter Jurisdiction

Non-Indians may bring a federal common law cause of action under 28 U.S.C. § 1331 to challenge tribal court jurisdiction. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850-53(1985); Boozer v. Wilder, 381 F.3d 931, 934 (9th Cir. 2004). Federal law defines the outer boundaries of an Indian tribe's power over non-Indians, and the question whether an Indian tribe retains the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a federal question under 28 U.S.C. § 1331. Crow Tribe of Indians, at 852; Boozer, at 934. "Whether a tribal court has adjudicative authority over nonmembers is a federal question." Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., ___U.S. ___, 128 S.Ct. 2709, 2716-17, 171 L.Ed.2d 457 (2008). Because Daniel Martinez is non-Indian, § 1331 provides subject matter jurisdiction over his federal common law challenge to the tribal court's jurisdiction to enter the protection order and adjudicate his dissolution.

Exhaustion of Tribal Remedies

Defendants move to dismiss Plaintiff's complaint pursuant to Rule 12(b)(1) and (6) on the ground Plaintiff did not properly exhaust the requisite tribal court remedies prior to bringing the instant action.

Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987); Atwood v. Fort Peck Tribal Court Assiniboine, 513 F.3d 943, 948 (9th Cir. 2008). The exhaustion rule is prudential, it is required as a matter of comity, not as a

jurisdictional prerequisite. Strate v. A-1 Contractors, 520 U.S. 438, 451(1997); Atwood, at 948. As a matter of discretion, a district court may either dismiss a case or stay the action while a tribal court handles the matter. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857(1985); Atwood, at 948. Ms. Martinez and The Suquamish Tribe assert that because the dissolution is still pending before the Tribal Court, this Court must either dismiss the action or stay the action while the Tribal Court handles the matter and is given the opportunity to determine jurisdiction in the first instance.

However, exhaustion is not required where the action is patently violative of express jurisdictional prohibitions or it is otherwise plain that the tribal court lacks jurisdiction over the dispute, such that adherence to the exhaustion requirement would serve no purpose other than delay. Nevada v. Hicks, 533 U.S. 353, 369 (2001); Strate, 520 U.S. at 459-60 n. 14; Boozer v. Wilder, 381 F.3d 931, 935 (9th Cir. 2004). Likewise, exhaustion is not required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. Crow Tribe of Indians, 471 U.S. at 856 n. 21 (1985); Boozer, at 935.

In this case, Plaintiff asserts that tribal jurisdiction is clearly lacking, thus excusing any failure to exhaust his tribal remedies prior to bringing suit in this Court. Defendants, on the other hand, take exception to Plaintiff's position and argue that this case falls firmly within the authorization of tribal jurisdiction over non-members of a tribe.

Appropriateness of Tribal Jurisdiction

An analysis of Indian tribal court jurisdiction begins with United States v. Montana, 450 U.S. 544 (1981). In Montana, the Supreme Court held that an Indian tribe could not regulate hunting and fishing by non-Indians on non-Indian owned fee land within the reservation. The Supreme Court further explained that there are two sources of tribal jurisdiction against nonmembers; either positive by law, by way of statute or treaty, or through the inherent sovereignty of the tribe. Montana, at

564.

The Defendants assert that Tribal Court jurisdiction exist by way of a positive grant of jurisdiction through federal statute and/or through the application of the exceptions for inherent tribal authority.

Legislative Grant of Jurisdiction

Both Defendants the Suquamish Tribe and Helen Martinez assert that there exist a federal grant of tribal jurisdiction under the Violence Against Women Act (VAWA). The Defendants reference the provisions of the VAWA governing enforcement of protection orders. Under the VAWA a tribal court protection order is entitled to full faith and credit in state courts "provided the tribal court has jurisdiction over the parties and matter under the laws of that tribe," and reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. 18 U.S.C. § 2265(b). The VAWA sets for the grant of tribal jurisdiction at 18 U.S.C. § 2265(e):

> Tribal court jurisdiction.--For purposes of this section, a tribal court shall have full civil jurisdiction to enforce protection orders, including authority to enforce any orders through civil contempt proceedings, exclusion of violators from Indian lands, and other appropriate mechanisms, in matters arising within the authority of the tribe.

Defendants then point to tribal law providing that any person may petition the tribal court for an order of protection by filing a petition alleging he or she has been the victim of domestic violence committed by the respondent. Suquamish Tribal Code § 7.28.2.

The Court does not construe the provisions of the VAWA as a grant of jurisdiction to the Suquamish Tribe to enter domestic violence protection orders as between two non-members of the Tribe that reside on fee land within the reservation. There is nothing in this language that explicitly confers upon the Tribe jurisdiction to regulate non-tribal member domestic relations. The grant of authority simply provides jurisdiction "in matters arising within the authority of the tribe."

Tribal jurisdiction over non-members is highly disfavored and there exists a presumption

against tribal jurisdiction. There must exist "express authorization" by federal statute of tribal jurisdiction over the conduct of non-members. Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1215, 1217 (9th Cir. 2000); Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997). For there to be an express delegation of jurisdiction over non-members there must be a "clear statement" of express delegation of jurisdiction. Bugenig, 1218-19.

The VAWA provisions provide that tribal protection orders are entitled to full faith and credit only where the tribal court has jurisdiction over the parties and matter under the laws of the tribe. This provision is simply a recognition of existing trial jurisdiction over the welfare of the Tribe and its members. It is not clear statement of express grant of expanded jurisdiction over non-members that has not been previously recognized by the courts and Congress. There is no express congressional authorization to enter protective orders (or entertain dissolution proceedings) against non-tribal members pursuant to the VAWA. Accordingly, there is no tribal jurisdiction pursuant to legislative grant.

Inherent Tribal Authority

The Defendants next assert that Tribal Court jurisdiction arises form the inherent sovereign powers of the Tribe. The sovereignty of Indian tribes is of a unique and limited character. It centers on the land held by the tribe and on tribal members within the reservation. Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., ___U.S. ___, 128 S.Ct. 2709, 2718, 171 L.Ed.2d 457 (2008). The Supreme Court has stated that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id., at 2718-19; United States v. Montana, 450 U.S. 544, 565 (1981). This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on non-Indian fee land." Plains Commerce Bank, at 2719: Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997).

At first blush it would appear that the Tribal Court lacks inherent sovereign powers jurisdiction over the conduct of Plaintiff, as he is a non-member of the Tribe. In fact, Helen Martinez

is an Alaska Native Indian, and for the purposes of determining the tribal jurisdiction of the Suquamish Tribal Courts, she also is not a member. See, Smith v. Salish Kootenai College, 434 F.3d 1127, 1132-33 (9th Cir. 2006). Further, the parties reside not on Indian land, but fee property owned by a non-member of the Suquamish Tribe.

The principle that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe is subject to two exceptions. The first exception relates to non-members who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997); Smith, 434 F.3d at 1131. The U.S. Supreme Court first identified these two exceptions in Montana. The first exception is that a tribe may regulate through taxation, licensing, or other means, "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." Montana, 450 U.S., at 565. The second exception is that a tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

These exceptions are limited, and cannot be construed in a manner that would swallow the rule, or severely shrink it. Plains Commerce Bank, at 128 S.Ct. 2720. Efforts by a tribe to regulate non-members, especially on non-Indian fee land, are presumptively invalid. The burden rests on the tribe to establish that one of the two Montana exceptions is satisfied. Id.; Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654, 659 (2001).

Consensual Relationship Exception

The Tribe and Ms. Martinez assert that Mr. Martinez has entered into a consensual relationship with the Suquamish Tribe by having availed himself of the Tribal Courts in prior actions concerning his relationship with his wife, Helen Martinez.

The Court finds this argument unpersuasive. Mr. Martinez is not engaged in any of the illustrative "consensual relationships" described in Montana: "commercial dealing, contracts, leases, or other arrangements." See United States v. Montana, 450 U.S. 544, 565 (1981). The analysis of Montana, and subsequent cases, expressly or implicitly recognize tribes limited authority over activity occurring within the reservation and tribes lack of authority to determine external relations. Montana, at 564. As Montana emphasizes, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation." Id. The unifying principle behind both of the Montana exceptions is that, absent express congressional delegation, a tribe has civil authority over non-Indians only where such authority is "necessary to protect tribal self-government or to control internal relations." Id. at 564. Although Montana specifically addressed the regulatory rather than the adjudicatory jurisdiction of tribes, there is nevertheless a presumption that if a tribe has authority under Montana to regulate the activities of a non-member, jurisdiction over disputes arising out of those activities exists in the tribal courts. Strate, 520 U.S. at 453. Absent regulatory authority, there is no adjudicatory jurisdiction. The exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations within the Tribe is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. South Dakota v. Bourland, 508 U.S. 679, 694-95 (1993). "As to nonmembers ... a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction...." Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997); Nevada v. Hicks, 533 U.S. 353, 357-58 (2001).

Consensual relation cases that have been recognized by the courts involve either direct regulation by a tribe of non-Indian activity on the reservation or lawsuits between a private party and the tribe or tribal members arising from an on-reservation transaction or agreement. See Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006)(non-member plaintiff brought suit in tribal court against tribal entity); Williams v. Lee, 358 U.S. 217 (1959)(non-member plaintiff brought action

in tribal court against tribal member). Here, as in Strate, there is no consensual relationship and thus, no tribal jurisdiction where the dispute is distinctly non-tribal in nature and arises between two non-Indians on fee land within the reservation. See Strate, 520 U.S., at 457.

As recently recognized in Plains Commerce Bank, the first exception is confined to regulation of non-Indian activities on the reservation that have a discernable effect on the tribe or its members. Plains Commerce Bank, v. Long Family Land and Cattle Co., ___ U.S. ___, 128 S.Ct. 2709, 2721, 171 L.Ed.2d 457 (2008). "The logic of Montana is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated." Id., at 2723. Where there exist no basis for tribal governance of non-members' conduct on fee land, it is equally evident that the tribal courts lack adjudicatory authority over disputes arising from such conduct. Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1092 (8th Cir. 1998).

Neither Mr. Martinez or his wife, Helen Martinez, are members of the Suquamish Tribe and their domicile is on fee land. Their domestic disputes and dissolution proceeding are distinctly non-tribal in nature and cannot be considered to have intruded on the internal relations of the Tribe or threatened tribal self-rule.

There is no debatable question or colorable claim as to the application of the first exception. The fact that the Tribal Court accepted jurisdiction over the conduct of these parties in the past does not infer Plaintiff's consent to present jurisdiction. It does, however, evidence a tribal court disregard for the limits of its jurisdiction. The Suquamish Tribal Court lacks jurisdiction under the first exception to entertain a dissolution proceeding or to enter protective orders as to these non-Tribal member parties to this litigation.

Political Integrity, Economic Security, and Health or Welfare Exception

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians'

conduct menaces the political integrity, the economic security, or the health or welfare of the tribe. Plains Commerce Bank, 128 S.Ct., at 2726; Montana, 450 U.S., at 566. This exception stems from the same sovereign interests that give rise to the first. Plains Commerce Bank, at 2726. The conduct must do more than injure the tribe, it must imperil the subsistence of the tribal community. Id.

It is a fundamental fact in this litigation that neither party is a member of the Suquamish Tribe. The dissolution proceeding and domestic relations between these parties does not fall within the rubic of directly affecting the health and welfare of the Tribe. The domestic relations of non-tribal parties does not "imperil the subsistence of the tribal community." The second exception is inapplicable. The Suquamish Tribal Court lacks jurisdiction to enter protective orders or entertain a dissolution proceeding as to these two non-members of the Tribe.

Conclusion

For the above stated reasons the Court finds that Plaintiff need not exhaust tribal remedies before challenging tribal jurisdiction in this Court. Jurisdiction is neither colorable or plausible. Jurisdiction over non-members of the Tribe domiciled on fee land is plainly lacking and exhaustion would only serve to delay the proceedings. Lacking jurisdiction, the underlying orders entered by the Tribal Court are necessarily null and void. The parties may petition the appropriate state court to resolve their disputes.

ACCORDINGLY;

IT IS ORDERED:

(1) Motion to Dismiss by Defendant Suquamish Tribe [Dkt. # 8] is **DENIED**.

(2) Motion to Dismiss by Defendant Helen Martinez [Dkt. #9] is **DENIED**.

(3) Plaintiff Daniel Martinez is **GRANTED** declaratory and injunctive relief. The Suquamish Tribe does not have civil jurisdiction to adjudicate domestic relation disputes between the non-members of the Tribe, Daniel and Helen Martinez. This lack of jurisdiction includes petitions for dissolution, child custody, and domestic

violence protection orders. Orders entered by the Suquamish Tribal Court relating to the domestic relations of Daniel Martinez and Helen Martinez are null and void. The Suquamish Tribal Court is enjoined from issuing or enforcing any said orders.

DATED this15th day of December, 2008

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE